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YEE TECK FAH (T/A YEE TECK FAH & CO)

v.

LIM SOO CHOOI

B

HIGH COURT MALAYA, SHAH ALAM
SURAYA OTHMAN J
[CIVIL APPEAL NO: A12-290-2010
(RS 143/2010) A]
C 31 MAY 2011

CIVIL PROCEDURE: *Affidavits - Defects - Absence of jurat - Preliminary objection - Whether failure to give notice of preliminary objection amounts to waiver of right to raise objection thereof*

D

CIVIL PROCEDURE: *Transfer of proceedings - Concurrent and coordinate jurisdiction of Sessions Courts - Application for transfer from Shah Alam Sessions Court to Butterworth Sessions Court - Local limits of jurisdiction of Sessions Courts - Power to transfer case to another Sessions Court of co-ordinate jurisdiction - Forum conveniens - Practice*
E *Direction No. 4 of 1993 - Subordinate Courts Act, 1948 s. 59(1)(2)*

The plaintiff, an advocate and solicitor, filed an action against the defendant in the Sessions Court, Shah Alam, Selangor to recover professional fees and disbursements due to him for services
F rendered to the defendant. The defendant applied to transfer the case to the Sessions Court, Butterworth, Penang. The learned Sessions Court judge allowed the defendant's application for the transfer and hence this appeal by the plaintiff. The plaintiff's counsel submitted that the Sessions Courts only have local limits
G of jurisdiction assigned to them and that the definition of "local limits" is set out in the High Court Practice Direction No. 4 of 1993 ("HCP 1993"), where the Chief Justice of Malaya then had assigned to the Shah Alam Sessions Court, the territorial jurisdictional area of Petaling Jaya and Kajang. Thus the plaintiff
H argued that the Sessions Judge erred when she transferred the case to Butterworth since the plaintiff's claim arose outside its territorial limit. Plaintiff's counsel also claimed that the defendant's application was misconceived as it did not state the relevant law under which it was being made. Plaintiff's counsel further claimed
I that the defendant's affidavits were defective since they did not contain jurats.

Held (allowing the appeal):

(1) The learned Sessions Judge had erred in allowing the defendant's application to transfer the said case to Butterworth, Penang Sessions Court. (para 36)

(2) Under s. 59(1) of the Subordinate Courts Act 1948 ("SCA 1948"), only the Yang di-Pertuan Agong has the power to assign local limits of jurisdiction to the Sessions Courts. Since His Royal Highness has not made any such order under the said section, which order has to be gazetted, to assign the local limits of jurisdiction of each Sessions Court, then, s. 59(2) comes into play; that is, if no such local limits have been assigned to the Sessions Courts, then the Sessions Courts have jurisdiction to hear and determine any cause or matter arising in any part of the local jurisdiction of the respective High Court. This means that the Sessions Courts have the same local jurisdiction as the High Courts as defined under s. 3 of the Courts of Judicature Act 1964 (Act 91) ("CJA 1964"); that is the Sessions Courts in Malaya have jurisdiction which covers all states in Peninsular Malaysia or West Malaysia and the Sessions Courts in Sabah and Sarawak have jurisdiction which covers both the states of Sabah and Sarawak or East Malaysia; *PP v. Segaran S Mathavan;* refd. (para 7)

(3) The Sessions Judge in Butterworth just like her counterpart in Shah Alam has territorial jurisdiction to hear and determine the plaintiff's claim since they enjoy concurrent as well as co-ordinate jurisdiction of each other. (para 19)

(4) The Sessions Court has the power to transfer the said case to another Sessions Court which is of co-ordinate jurisdiction. The question was whether from the facts of the case, it met the criteria as specified in paras. 2 and 3 and the principle or doctrine of *"forum conveniens"*. (para 24)

(5) The cause of action clearly arose in Petaling Jaya where all the transactions for the professional services rendered by the plaintiff were done in Petaling Jaya. The defendant himself had opted to open a case with the plaintiff, a legal firm situated in Petaling Jaya, to deal with his case. It was therefore unreasonable if the said case was to be transferred from Shah

A Alam to Butterworth since the plaintiff's witnesses, especially the plaintiff's staff were located in Shah Alam. Furthermore the expenses incurred for the witnesses and the plaintiff's staff to attend the Butterworth Sessions Court would be far higher compared to the defendant's expenses to attend the Shah
B Alam Sessions Court. Therefore, the case was more suitable and appropriate in the circumstances to be heard in Shah Alam, Selangor Sessions Court. (para 32)

(6) Since the plaintiff failed to give notice of any preliminary
C objections to the defendant (on alleged non-compliance of procedural rules), the plaintiff was deemed to have waived his rights to raise such preliminary objections; *Mohammad Idres Mohd Sulaiman Shah v. Malayan Banking Bhd*; refd, *WJ Alan & Co Ltd v. El Nasr Export & Import Co*; refd and *Usman*
D *Ahmad v. Chin Brothers Construction Co;* refd). (para 34)

Case(s) referred to:

American Express Bank Ltd v. Mohamad Toufic Al-Ozeir & Anor [1995] 1 CLJ 273 SC ***(refd)***

Bank Utama (Malaysia) Bhd v. Perkapalan Dai Zhun Sdn Bhd [2003] 1
E *CLJ 450 HC* ***(refd)***

Khor Seow Kee v. Boon Hock Sawmill Sdn Bhd [1993] 4 CLJ 365 HC ***(refd)***

Kilang Papan Pulau Sebang Sdn Bhd v. Lim Trading & Co [2004] 1 LNS 370 HC ***(refd)***

Malacca Securities Sdn Bhd v. Loke Yu [1998] 3 CLJ 22 HC ***(refd)***
F

Metro Kajang Construction Sdn Bhd v. Eka Bahtera Sdn Bhd [2001] 3 CLJ 951 HC ***(refd)***

Mohammad Idres Mohd Sulaiman Shah v. Malayan Banking Bhd [2001] 5 CLJ 308 HC ***(refd)***

PP v. Segaran S Mathavan [2010] 2 CLJ 121; [2009] 1 LNS 699 HC
G ***(refd)***

Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd [1987] 1 LNS 55 HC ***(refd)***

Taman Rimba (Mentakab) Sdn Bhd v. Sin Yew Poh Tractor Works [2002] 2 CLJ 112 HC ***(refd)***

Usman Ahmad v. Chin Brothers Construction Co [2000] 4 CLJ 785 HC
H ***(refd)***

WJ Alan & Co Ltd v. El Nasr Export & Import Co [1972] 2 All ER 127 ***(refd)***

Legislation referred to:

I Courts of Judicature Act 1964, s. 3
Rules of the High Court 1980, O. 41 rr. 1(7), (8), 2(2)
Subordinate Courts Act 1948, ss. 59(1), (2), 99A
Subordinate Courts Rules 1980, O. 25 rr. 22(1), (7), (8)

For the plaintiff - Yee Teck Fah; M/s Yee Teck Fah & Co
For the defendant - Tan Kah Hoo; M/s Gan Teik Che & Ho

Reported by Amutha Suppayah

JUDGEMENT

Suraya Othman J:

Introduction

[1] On 17 March 2008, the defendant filed an application for a transfer of a civil case ("said case") pending in the Sessions Court, Shah Alam, Selangor to the Sessions Court, Butterworth, Penang. On 31 March 2010, the learned Sessions Court judge ("Sessions Judge") allowed the defendant's application to transfer the said case. The plaintiff, dissatisfied with the order of the Sessions Judge, appealed to the High Court. It is from this decision/order that the appeal before me now lies.

Facts And Background

[2] The brief facts are as follows. The plaintiff, who is an advocate and solicitor claimed for legal fees in the sum of RM179,430.22 being professional fees and disbursements due to him for services rendered to the defendant under bills dated 2 December 2005, 22 June 2006, 1 February 2007 and 1 March 2007. Despite repeated requests and demands, the plaintiff alleged that the defendant failed or neglected to pay the plaintiff the claimed sum and consequently, the plaintiff filed an action against the defendant ("said case") in the Sessions Court, Shah Alam, Selangor to recover the amount owed.

Plaintiff's Submission

[3] Mr Yee Teck Fah, the plaintiff, who is an advocate and solicitor representing himself in this appeal submitted that the Sessions Courts unlike the High Courts do not enjoy concurrent territorial jurisdiction of each other. The Sessions Courts only have local limits of jurisdiction assigned to them and not otherwise which is expressly stated in s. 59(1) of the Subordinate Courts Act 1948 (Act 92) ("SCA 1948"). The definition of "local limits" is set out in the High Court Practice Direction No. 4 of 1993

("HCP 1993"), where the Chief Justice of Malaya then had assigned to Shah Alam Sessions Court the territorial jurisdictional area of Petaling Jaya and Kajang. Therefore according to s. 59(1) SCA 1948 and the HCP 1993, only the Shah Alam Sessions Court has territorial jurisdiction to hear and determine the plaintiff's claim. Thus the Sessions Judge erred in fact and/or law when she transferred the said case to Butterworth, Penang Sessions Court since the Butterworth, Penang Sessions Court has no territorial jurisdiction to hear and determine the plaintiff's claim arising outside its territorial limit. In this light, the plaintiff refers to the case of *Taman Rimba (Mentakab) Sdn Bhd v. Sin Yew Poh Tractor Works* [2002] 2 CLJ 112 in support.

[4] Mr Yee Teck Fah contended that he, as an advocate and solicitor of the High Court of Malaya, is practicing and has his office at No. 705 Block E, Phileo Damansara 1, No. 9, Jalan 16/11, 46350 Petaling Jaya, Selangor Darul Ehsan. He also lives in the state of Selangor. The cause of action accrues in the state of Selangor where the breach in the form of payments due to him from the defendant for legal services rendered occurred.

[5] Mr Yee Teck Fah argued that the defendant's application is baseless and misconceived as it does not state and/or invoke the relevant law and/or procedural rule under which the defendant's application is being made for an order to transfer the said case to Butterworth, Penang Sessions Court. Such failure according to Low Hop Bing J, (as he then was), in *Kilang Papan Pulau Sebang Sdn Bhd v. Lim Trading & Co* [2004] 1 LNS 370 renders the application devoid of any basis whatsoever.

[6] Mr Yee Teck Fah further submitted that the defect in the application is further compounded by the defendant's defective affidavits filed purportedly in support of the application. This argument is based on the fact that the defendant after having filed several affidavits in this action alleges for the first time in his affidavit affirmed on 12 May 2008 that he is illiterate in Bahasa Malaysia and the English language. If the defendant's allegation is true than all his affidavits must have jurats that fully comply with O. 25 r. 22(1), (7) and (8) of the Subordinate Courts Rules, 1980 which is the equivalent of O. 41 r. 1(7), (8) and 2(2) of the Rules of the High Court, 1980, failing which they are defective and must be rejected. This principle of law was applied in the case of *Metro Kajang Construction Sdn Bhd v. Eka Bahtera Sdn Bhd* [2001] 3 CLJ 951.

Defendant's Submission

[7] Replying to the plaintiff's submission, counsel for the defendant, Mr Tan Kah Hoo, contended that the plaintiff's authority of *Taman Rimba (Mentakab) Sdn Bhd v. Sin Yew Poh Tractor Works (supra)* has recently been distinguished by the High Court in *PP v. Segaran S Mathavan* [2010] 2 CLJ 121; [2009] 1 LNS 699 where Yeow Wee Siam, JC, held that:

> With utmost respect to James Foong J (as he then was) and the Sessions Court judge, I am of the humble view that s. 59(2) must be read first of all with s. 59(1) of the SCA. Under s. 59(1) of the SCA, it is only the Yang di-Pertuan Agong who may by order constitute the Sessions Courts as he thinks fit, and he shall also have the power to assign the local limits of jurisdiction of the Sessions Courts. From a search done by my senior assistant registrar, it appears that so far, the Yang di-Pertuan Agong has not made any order under s. 59(1) of the SCA, that has been gazetted, to assign the local limits of jurisdiction of each Sessions Court. That being the case, administratively, the Sessions Courts have been guided by the High Court Practice Directions No 2 of 1993 and 4 of 1993 regarding their local limits of jurisdiction. In my opinion, the practice directions serve very well for the day-to-day registration and hearing of cases in the various Sessions Courts listed in the two Practice Directions. However, when the vital issue arises, such as in this application before me, as to whether the PJ Sessions Court, under the Shah Alam Sessions Court, and the KL Sessions already have local limits of jurisdiction assigned to them by order made by the Yang di-Pertuan Agong under s. 59(1) of the SCA, then the answer is in the negative.

[8] Mr Tan Kah Hoo submitted that since *Taman Rimba (Mentakab) Sdn Bhd's* case has been distinguished, and no local limits of jurisdiction has been assigned to each Sessions Court by the Yang di-Pertuan Agong, then the Sessions Court has jurisdiction to hear and determine any cause or matter arising in any part of the local jurisdiction of the respective High Court, which means that the Sessions Court has the same local jurisdiction of a High Court. As such the Sessions Court can sit anywhere, at any branch in Peninsular Malaysia or West Malaysia.

[9] In determining the territorial jurisdiction and powers of a Sessions Court, Mr Tan Kah Hoo further submitted that this court should, in addition to the considerations in paras. 2 and 3 of the Third Schedule of the SCA 1948, bear in mind the

A doctrine of forum conveniens as noted by Peh Swee Chin FCJ, in *American Express Bank Ltd v. Mohamad Toufic Al-Ozeir & Anor* [1995] 1 CLJ 273 and the case of *Sova Sdn Bhd v. Kasih Sayang Realty Sdn Bhd* [1987] 1 LNS 55.

B **[10]** As regard to the procedural issues, Mr Tan Kah Hoo pointed out that the plaintiff has waived his right to raise procedural objections and is estopped from doing so as there was no indication by the plaintiff that any procedural objections would be raised, whether by affidavits, correspondences or even during C the hearings in the court below. Therefore the plaintiff has refused, neglected and/or failed to give the defendant any notice of any preliminary objection as to the alleged non-compliance of the defendant's affidavits and/or notice of application. This has led the defendant to believe and act in the knowledge that the plaintiff D had by his conduct waived his right to raise any preliminary objections.

Issues Before The Court

[11] The issues before the court are:

E

(1) What is the territorial jurisdiction of the Sessions Courts;

(a) Whether the Sessions Courts have the restriction of local limits of jurisdiction assigned to them;

F (b) If no local limits of jurisdiction have been assigned to them, whether the Sessions Courts have the same local jurisdiction as the High Courts.

(2) What is the *"forum conveniens"* of this case: whether it is the G Shah Alam, Selangor Sessions Court or the Butterworth, Penang Sessions Court;

(3) What is the effect of non-compliance to the procedural rules in making the application by the defendant.

H **Findings Of The Court**

(1) What is the territorial jurisdiction of the Sessions Courts;

(a) Whether the Sessions Courts have the restriction of local limits of jurisdiction assigned to them;

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(b) If no local limits of jurisdiction have been assigned to them, whether the Sessions Courts have the same local jurisdiction as the High Courts.

[12] The law applicable in respect of the territorial jurisdiction of the Subordinate Courts is found in s. 59, Part VI of the Subordinate Courts Act 1948 ("SCA 1948"). Section 59 states:

Constitution and territorial jurisdiction of Sessions Courts.

59.(1) The Yang di-Pertuan Agong may, by order, constitute so many Sessions Courts as he may think fit and shall have power, if he thinks fit, to assign local limits of jurisdiction thereto.

(2) Subject to this Act or any other written law, *a Sessions Court shall have jurisdiction to hear and determine any civil and criminal cause or matter arising within the local limits of jurisdiction assigned to it under this section or, if no such local limits have been assigned, arising in any part of the local jurisdiction of the respective High Court.*

(3) Each Sessions Court shall be presided over by a Sessions Court Judge appointed by the Yang di-Pertuan Agong on the recommendation of the Chief Judge.

(4) Sessions Courts shall ordinarily be held at such places as the Chief Judge may direct, but should necessity arise they may also be held at any other place within the limits of their jurisdiction.

[13] Therefore s. 59 SCA 1948 sets out the constitution and territorial jurisdiction of the Sessions Courts. In s. 59(2) it is stated that the Sessions Courts have jurisdiction to hear cases within the local limits of jurisdiction assigned to them and if no such local limits have been so assigned, then their jurisdiction will be the jurisdiction of the respective High Courts.

[14] Another relevant provision in respect of the territorial jurisdiction is found in s. 3 of the Courts of Judicature Act 1964 (Act 91) ("CJA 1964"). Section 3 of the CJA 1964 define the terms "High Court" and "local jurisdiction" as below:

"High Court" means the High Court in Malaya and the High Court in Sabah and Sarawak or either of them, as the case may require.

A "local jurisdiction" means:

(a) in the case of the High Court in Malaya, the territory comprised in the States of Malaya, namely, Johore, Kedah, Kelantan, Malacca, Negeri Sembilan, Pahang, Penang, Perak, Perlis, Selangor and Terengganu and the Federal Territory
B of Kuala Lumpur; and

(b) in the case of the High Court in Sabah and Sarawak, the territory comprised in the States of Sabah and Sarawak and the Federal Territory of Labuan,

C including, in either case, the territorial waters and the air space above those States and the territorial waters;

[15] Therefore s. 3 of the CJA 1964, sets out the territorial jurisdiction of the two High Courts; the High Court in Malaya and
D the High Court in Sabah and Sarawak. The High Court in (of) Malaya have territorial jurisdiction in Peninsular Malaysia or West Malaysia while the High Court in (of) Sabah and Sarawak have territorial jurisdiction over the two states of Sabah and Sarawak or East Malaysia.

E **[16]** The question then, based on the provisions mentioned above, what is the territorial jurisdiction of the Sessions Courts?

[17] In deciding what is the territorial jurisdiction of the Sessions Courts, I am in agreement with the decision of *PP v. Segaran*
F *S Mathavan (supra)* that under s. 59(1), only the Yang di-Pertuan Agong has the power to assign local limits of jurisdiction to the Sessions Courts. And since His Royal Highness has not made any such order under the said section, which order has to be gazetted, to assign the local limits of jurisdiction of each Sessions
G Court, then, s. 59(2) comes into play; that is, if no such local limits have been assigned to the Sessions Courts, then the Sessions Courts have jurisdiction to hear and determine any cause or matter arising in any part of the local jurisdiction of the respective High Court. This means that the Sessions Courts have
H the same local jurisdiction as the High Courts as defined under s. 3 of the CJA 1964; that is the Sessions Courts in Malaya have jurisdiction which covers all states in Peninsular Malaysia or West Malaysia and the Sessions Courts in Sabah and Sarawak have jurisdiction which covers both the states of Sabah and Sarawak
I or East Malaysia.

[18] Therefore, the Sessions Courts in (of) Malaya just like the High Courts in (of) Malaya can sit anywhere, at any branch, in Peninsular Malaysia or West Malaysia. Likewise, the Sessions Courts in (of) Sabah and Sarawak just like the High Courts in (of) Sabah and Sarawak can sit anywhere, at any branch in Sabah and Sarawak or East Malaysia. The result is that both the High Courts and the Sessions Courts have the same territorial (local) jurisdiction and as such the Sessions Courts just like the High Courts enjoy concurrent and co-ordinate jurisdiction of each other.

[19] Reverting back to our instant case, the position is that the Sessions Judge in Butterworth just like her counterpart in Shah Alam has territorial jurisdiction to hear and determine the plaintiff's claim since they enjoy concurrent as well as co-ordinate jurisdiction of each other.

[20] Therefore the answers to the first issue are:

(a) The Sessions Courts have no restriction of local limits of jurisdiction assigned to them. This is so since His Royal Highness the Yang di-Pertuan Agong has not assigned them their local limits of jurisdiction under s. 59(1) of SCA 1948 and;

(b) Since no local limits of jurisdiction have been assigned to the Sessions Courts by His Royal Highness the Yang di-Pertuan Agong, the Sessions Courts then have the same local (territorial) limits of jurisdiction as the High Courts which mean the Sessions Courts just like the High Courts enjoy concurrent and co-ordinate jurisdiction of each other.

What Is The "Forum Conveniens" Of This Case: Whether It Is The Shah Alam, Selangor Sessions Court Or The Butterworth, Penang Sessions Court

[21] The defendant contends that the *"forum conveniens"* to try the said case is the Butterworth, Penang Sessions Court and not the Shah Alam, Selangor Sessions Court.

[22] Before delving into this issue, the section that gives jurisdiction to a Sessions Court to transfer a case to another Sessions Court is found in s. 99A, Part X of the SCA 1948. Section 99A states:

Further powers and jurisdiction of courts.

99A. In amplification and not in derogation of the powers conferred by this Act or inherent in any court, and without prejudice to the generality of any such powers, every Sessions Courts and Magistrates' Court shall have the further powers and jurisdiction set out in the Third Schedule.

[23] The Third Schedule which is relevant to this appeal is in paras. 2 and 3 which states:

Stay of proceedings

2. Power to stay proceedings unless they have been instituted in the District in which:

(a) the cause of action arose, or

(b) the defendant resides or has his place of business, or

(c) one of several defendants resides or has his place of business,

(d) the facts on which the proceedings are based exist or are alleged to have occurred, or

(e) for other reasons it is desirable in the interests of justice that the proceedings should be had.

Transfer of proceedings

3. (1) (Repealed)

(2) Power, on application or of its own motion, to transfer any proceedings to another court of co-ordinate jurisdiction.

[24] Therefore the Sessions Court has the power to transfer the said case to another Sessions Court which is of co-ordinate jurisdiction. The question is whether from the facts of the case, it meets the criteria as specified in paras. 2 and 3 and the principle or doctrine of *"forum conveniens"*.

What Is The Principle Or Doctrine Of "Forum Conveniens"?

[25] *"Forum conveniens"* or also termed as "forum non conveniens" as defined by *Black's Law Dictionary*, 7th edn by Bryan A Garner are defined as below:

> ***"forum conveniens"*** means (Latin: "a suitable forum") The court in which an action is most appropriately brought, considering the best interests and convenience of the parties and witnesses. Cf. FORUM NON CONVENIENS.
>
> ***"forum non conveniens"*** means (Latin: "an unsuitable court") Civil procedure. The doctrine that an appropriate forum – even though competent under the law – may divest itself or jurisdiction if, for the convenience of the litigants and the witnesses, it appears that the action should proceed in another forum in which the action might originally have been brought. Also termed *forum inconveniens.*
>
> > *Forum non conveniens* allows a court to exercise its discretion to avoid the oppression or vexation that might result from automatically honoring plaintiff's forum choice. However, dismissal on the basis of *forum non conveniens* also requires that there be an alternative forum in which the suit can be prosecuted. It must appear that jurisdiction over all parties can be secured and that complete relief can be obtained in the supposedly more convenient court. Further, in at least some states, it has been held that the doctrine cannot be successfully invoked when the plaintiff is resident of the forum state since, effectively, one of the functions of the state courts is to provide a tribunal in which their residents can obtain an adjudication of their grievances. But in most instances a balancing of the convenience to all the parties will be considered and no one factor will preclude a *forum non conveniens* dismissal, as long as another forum is available. Jack H. Friedenthal st al., Civil Procedure S 2.17, at 87-88 (2d. 1993).

[26] Therefore the terms are used interchangeably and it means, in brief, a most suitable or appropriate forum which take into consideration the best interests and convenience of the parties and witnesses.

[27] In the case of *American Express Bank Ltd v. Mohamed Toufic Al-Ozier & Anor* [1995] 1 CLJ 273 the Supreme Court held that the word *"conveniens"* in *forum non conveniens* meant suitability or appropriateness of the relevant jurisdiction in the interests of all the parties and for the ends of justice and not one of convenience. The said court also held that the onus is on the applicant to satisfy the court that some other forum is more appropriate. The court stated:

A The doctrine of *forum non conveniens* appears to have originated in Scotland and has finally found full acceptance by the House of Lords in *Spiliada Maritime Corp v. Cansulax Ltd (The Spiliada)* [1987] AC 460; [1986] 3 All ER 843; [1986] 3 WLR 972 after a series of decisions, as described and set out so well in that very interesting and readable joint article by RH Hickling and Assoc B Prof. Wu Min Aun, *'Stay of Actions and Forum Non Conveniens'* [1994] 3 MLJ xcvii.

The main judgment in *The Spiliada* was delivered by Lord Goff, who adopted the dictum of Lord Kinnear in *Sim v. Robinow* C [1892] 19 R (Ct of Sess) 665 at p 668 being the fundamental principle in regard to this doctrine, ie, that 'there is some other tribunal, having competent jurisdiction, in which the case may be tried *more suitably for the interests of all the parties and for the ends of justice'. Lord Goff cautioned that the word 'conveniens' in forum non conveniens meant suitability or appropriateness of the relevant jurisdiction* D *and not one of convenience.* We are in entire agreement with the fundamental principle so expressed.

In our view, where an application by a defendant for stay of proceedings is concerned, in applying the said doctrine, the defendant would have to satisfy the court that 'some other forum E is more appropriate' per Lord Templeman in *The Spiliada*.

[28] Therefore, has the defendant satisfied this court that the Butterworth, Penang Sessions Court is more appropriate or suitable in the interests of all the parties and for the ends of F justice and not one of convenience than the Shah Alam, Selangor Sessions Court?

[29] In the case of *Bank Utama (Malaysia) Bhd v. Perkapalan Dai Zhun Sdn Bhd* [2003] 1 CLJ 450 the court held that:

G The doctrine of forum convenience calls for the matter to be heard by a court which is more accessible and appropriate in the interest of all parties and for the ends of justice, notwithstanding that other courts also have territorial jurisdiction pursuant to s. 23(1) of the Act Courts of Judicature Act 1964 (see *Malacca* H *Securities Sdn Bhd v. Loke Yu* [1998] 3 CLJ 22; [1999] 6 MLJ 112 at p 120).

[30] And in the case of *Khor Seow Kee v. Boon Hock Sawmill Sdn Bhd* [1993] 4 CLJ 365 Abdul Malik, JC, (as he then was), said at p. 366: I

> The legislature in creating a branch of the High Court in Malaya in each State, must have thought of bringing the High Court closer to the rakyat. Easy accessibility of the High Court would lessen the inconvenience of travelling (the amount of costs would not outweigh the inconvenience caused) and the incurring expense that would flow from it. This would, in turn, facilitate the disposal of cases and ease the backlog to a certain extent. This argument would likewise apply, with equal force, to the Sessions Court.

[31] Therefore, is the Butterworth, Penang Sessions Court more accessible and appropriate for the parties in the circumstances?

[32] In our instant case, the cause of action clearly arose in Petaling Jaya where all the transactions for the professional services rendered by the plaintiff were done in Petaling Jaya. The defendant himself had opted to open a case with the plaintiff, a legal firm situated in Petaling Jaya, to deal with his case. It is therefore unreasonable if the said case was to be transferred from Shah Alam to Butterworth since the plaintiff's witnesses, especially the plaintiff's staff are located in Shah Alam. Furthermore the expenses incurred for the witnesses and the plaintiff's staff to attend the Butterworth Sessions Court would be far higher compared to the defendant's expenses to attend the Shah Alam Sessions Court. Therefore, I am of the view that the said case is more suitable and appropriate in the circumstances to be heard in Shah Alam, Selangor Sessions Court. In this regard, the case of *Malacca Securities Sdn Bhd v. Loke Yu* [1998] 3 CLJ 22, is of great assistance where it was held by Augustine Paul J, (as he then was), at p. 127 as follows:

> In a contract for the payment of money the breach occurs when there is a failure to pay the sum promised. This is logical as the meaning of 'cause of action' is the act on the part of the defendant which gives the plaintiff his cause of complaint (see *Jackson v. Spittall* [1870] 5 LR CP 542). The failure to pay will be the cause of complaint. That breach will have to be at the place where the payment is to be made and the cause of action will therefore accrue in that place. (see *Bank Bumiputra (Malaysia) Berhad v. Melewar Holdings Sdn Bhd & Ors* [1990] 1 CLJ 1246; [1990] 1 CLJ (Rep) 654. Where there is no agreement as to the place where the payment should be made then the payment should be made at the place where the plaintiff lives.

[33] Therefore, the *forum conveniens* is the Shah Alam, Selangor Sessions Court for the following reasons:

A (a) the defendant himself had opted to open a case with the plaintiff, a legal firm situated in Petaling Jaya, to deal with his case.

(b) the plaintiff's practiced as an advocate and solicitor of the
B High Court of Malaya at No. 705 Blok E, Phileo Damansara 1, No. 9, Jalan 16/11, 46350 Petaling Jaya, Selangor Darul Ehsan.

(c) the plaintiff also lives in the State of Selangor;

C (d) the witnesses which includes the plaintiff's staff are from or near Shah Alam, Selangor.

(e) the cause of action accrued in Selangor. (*Malacca Securities Sdn Bhd v. Loke Yu (supra)* refers.

D *What Is The Effect Of Non-compliance To The Procedural Rules In Making The Application For Transfer By The Defendant*

[34] As to the plaintiff's contention that the defendant's application to transfer the said case to Butterworth Sessions
E Court, Penang was defective for non-compliance to the procedural rules, this court agrees with the defendant's counsel, Mr Tan Kah Hoo that since the plaintiff has failed to give notice of any preliminary objections to the defendant, then the plaintiff is deemed to have waived his rights to raise such preliminary
F objections. This principle has been decided in the cases of *Mohammad Idres Mohd Sulaiman Shah v. Malayan Banking Bhd* [2001] 5 CLJ 308; *WJ Alan & Co Ltd v. El Nasr Export & Import Co* [1972] 2 All ER 127; and *Usman Ahmad v. Chin Brothers Construction Co* [2000] 4 CLJ 785.

G **Conclusion**

[35] On examination of ss. 59 and 99A SCA 1948 and s. 3 CJA 1964 and the relevant cases, the Sessions Court Butterworth, Penang as well as the Shah Alam, Selangor Sessions Court; in fact
H any Sessions Courts throughout Peninsular Malaysia or West Malaysia have territorial jurisdiction to hear the said case since they enjoy concurrent and co-ordinate jurisdiction of each other. This is so since no local limits of jurisdiction has been assigned to
I each Sessions Court by His Highness, the Yang di-Pertuan Agong.

As such the Sessions Courts have jurisdiction to hear and determine any cause or matter arising in any part of the local jurisdiction of the respective High Courts which mean the Sessions Courts in (of) Malaya just like the High Courts in (of) Malaya can sit anywhere, at any branch, in Peninsular Malaysia or West Malaysia since they have the same local jurisdiction. Be as it may, the deciding factor as to whether which court is more suitable and appropriate depends on the *forum conveniens* of the case. In this appeal the applicant (defendant) has the onus to satisfy this court that the Butterworth, Penang Sessions Court is the more appropriate forum. This the applicant has failed to do. Considering that the defendant himself had opted to open a case with the plaintiff, a legal firm situated in Petaling Jaya to deal with his case, the plaintiff resides and carries on his business in Petaling Jaya, the witnesses are mainly from or near Shah Alam and the cause of action accrued in Selangor, the said case is more suitable and appropriate, in the circumstances, to be heard in the Sessions Court in Shah Alam, Selangor. Therefore, the plaintiff is entitled to proceed on with the said case in the Shah Alam Sessions Court.

[36] To sum up, this court finds that the learned Sessions Judge has erred in allowing the defendant's application to transfer the said case to the Butterworth, Penang Sessions Court. The said case should have remained in the Sessions Court Shah Alam, Selangor. Therefore, the appeal ought to be and is thereby allowed. The decision of the learned Sessions Judge which was given on 31 March 2010 is hereby set aside.

[37] Appeal allowed. No order as to costs.